

A                    **BSN COMMERCIAL BANK (MALAYSIA) BHD**

v.

**MESRA VENTURE SDN BHD & ANOR**

B                    HIGH COURT MALAYA, MELAKA  
                         LOW HOP BING J  
                         [CIVIL SUIT NO: 22-211-2002]  
                         29 MARCH 2007

C                    **CIVIL PROCEDURE:** *Judgment - Setting aside - Application to set aside default judgment - Whether made within thirty days - Whether there was inordinate delay*

D                    **CIVIL PROCEDURE:** *Jurisdiction - Forum conveniens - Proper forum - Place where cause of action arose - Place of occurrence of facts on which proceedings are based*

E                    **CONTRACT:** *Guarantee - Guarantor - Default of loan - Where borrower does not dispute its liability - Whether validity of debt may be challenged by guarantor*

F                    **CONTRACT:** *Guarantee - Guarantor - Whether guarantee executed by nominee director is enforceable*

F                    **CIVIL PROCEDURE:** *Interest - Judgment debt - Rate of interest exceeding 8% p.a. - Whether permitted under O. 42 r. 12 Rules of the High Court 1980*

G                    The plaintiff had granted to the first defendant banking facilities and the second defendant was the first defendant's director and guarantor. Both defendants subsequently did not comply with the plaintiff's demand for repayment of the facilities. The plaintiff then commenced writ of summons and obtained judgment in default of appearance against both defendants. The second defendant applied to set aside the default judgment obtained against her. The learned registrar dismissed the second defendant's application and the second defendant filed this appeal against that decision.

H                    Plaintiff's counsel argued that the second defendant's application had occasioned a delay of 20 months after service of the judgment on her. The second defendant's learned counsel contended that the delay, if any, was merely technical, citing O. 2 r. 1(1) and

I                    O. 1A Rules of the High Court 1980 ('RHC'). The second

defendant also relied on s. 23(1) of the Courts of Judicature 1964 ('CJA') to argue that the Melaka High Court was not the proper forum to hear this matter as she had a business address in Muar and the land charged to the plaintiff was also situated in Muar. The second defendant also, *inter alia*, contended that: (a) the facilities granted to the first defendant were *ultra vires* the first defendant's memorandum of association, as a result of which she could not be liable; (b) the rate of interest exceeding 8% p.a. awarded to the plaintiff was excessive; (c) the second defendant was merely acting as a nominee director of the first defendant and so could not be liable for the debt of the first defendant.

**Held (dismissing the appeal with costs):**

- (1) The delay of 20 months could not be said to be a mere technicality. The application to set aside the default judgment must be done within the time frame of 30 days stated in O. 42 r. 13 RHC. The second defendant had neither made an application for extension of time nor proffered any explanation for the 20-month delay, although it is incumbent on her to do so. Such omission or failure militated against the defendant's case. (paras 14, 15 & 18)
- (2) The second defendant had applied for and obtained the facilities from the plaintiff in Melaka and the first defendant's registered address was also in Melaka. Therefore, Melaka was the place where the cause of action arose under s. 23(1)(a) CJA, or the facts on which the proceedings were based existed or were alleged to have occurred under s. 23(1)(c) CJA. As the second defendant had executed the documents for the facilities in Melaka, she could not contend that the Melaka High Court was not the proper *forum conveniens*. (paras 22 & 24)
- (3) The first defendant's failure to challenge the default judgment meant that the first defendant had accepted its liability based on the facilities. The guarantee executed by the second defendant provided that the second defendant as a principal debtor shall guarantee and indemnify the plaintiff on all the debts due and owing by the first defendant to the plaintiff from time to time under the facilities. (para 35)

A (4) In the documents executed by the parties, the second defendant had agreed to the rate of interest imposed by the plaintiff and the plaintiff had the right to vary the rate thereof. The rate of interest exceeding 8% p.a. imposed on the default judgment is permitted under O. 42 r. 12 RHC. (paras 39 & 40)

B (5) The second defendant's liability was expressly contained in the guarantee. The fact that she was perceived as a nominee director did not detract from her liability as a guarantor. (para 60)

C **Case(s) referred to:**

- Bank Utama (Malaysia) Bhd v. The owner of & other persons interested in the Vessel 'Pintas Samutra 1' & Ors* [2003] 8 CLJ 110 HC (**refd**)
- D *Carlsberg Brewery Malaysia Bhd v. Soon Heng Aw & Sons Sdn Bhd & Ors* [1988] 2 CLJ 754; [1988] 1 CLJ (Rep) 420 HC (**refd**)
- Chew Soon Tat v. Malaysia National Insurance Sdn Bhd* [1977] 1 LNS 15 (**refd**)
- Development & Commercial Bank Bhd v. Syarikat Farnco Sdn Bhd & Ors* [1988] 1 LNS 83 (**refd**)
- E *Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLJ 267 (**refd**)
- Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 CA (**refd**)
- Lee Tain Tshung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15 CA (**refd**)
- Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 CLJ 263 HC (**refd**)
- F *Malayan United Bank Bhd v. Mohammed Salleh Mohammed Yusoff & Ors* [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 HC (**refd**)
- Malaysia Building Society Bhd v. Univein Sdn Bhd* [2002] 2 CLJ 81 HC (**refd**)
- MBF Finance Bhd v. Chew Liong Gak* [1993] 1 LNS 307 (**refd**)
- G *MBF Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38 HC (**refd**)
- Mohamed Taib Haji Ibrahim & Anor v. Perwira Habib Bank Malaysia Bhd* [1987] 2 MLJ 123 (**refd**)
- Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533 CA (**refd**)
- Pengkalen Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326 HC (**refd**)
- H *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd & Ors* [1988] 1 LNS 82 (**refd**)
- Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346 CA (**refd**)
- I *Realvest Properties Sdn Bhd v. The Co-operative Central Bank Ltd (Under Receivership)* [1996] 3 CLJ 823 FC (**refd**)

*Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374 FC (refd) A

*Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55 (refd)

*Tan Ewe Chong & Ors v. Pribudi Sdn Bhd & Ors* [1997] 3 CLJ Supp 372 HC (refd)

*Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors* [1999] 2 CLJ 51 (refd) B

*Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad* [1996] 1 CLJ 241 FC (refd)

#### Legislation referred to:

Contracts Act 1950, s. 75

Courts of Judicature Act 1964, ss. 3, 23(1)(a), (c)

Federal Constitution, art. 121(1)

Interpretation Acts 1948 and 1967, s. 12

Rules of the High Court 1980, O. 1A, O. 2 r. 1(1), O. 10 r. 1(1),  
O. 13 r. 1, O. 14, O. 42 rr. 12, 13

*For the plaintiff - Mark Taye; M/s Taye & Co*

*For the 2nd defendant - AB Ng; M/s AB Ng & Assoc*

*Reported by Amutha Suppayah*

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## JUDGMENT

### Low Hop Bing J:

#### Appeal

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[1] This is the appeal in encl. (60) filed by the second defendant against the decision of the learned registrar who had on 3 January 2006 dismissed with costs the second defendant's application in encl. (27) which sought to set aside the judgment in default of appearance obtained by the plaintiff against the second defendant on 17 February 2003, under O. 13 r. 1 of the Rules of the High Court 1980.

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[2] For brevity and convenience, a reference to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, unless otherwise stated.

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#### Factual Background

[3] Pursuant to the application of both the defendants herein, the plaintiff *vide* letters of offer dated 20 October 1998, 12 May 1999, 29 July 1999 and 31 January 2000, and loan agreements dated 3 December 1998, 31 May 1999 and 11 March 2000,

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A granted to the first defendant banking facilities in the form of loan stock, term loan, overdraft, trust receipt and bankers acceptance, all amounting to RM9.4 million (collectively, “the facilities”).

B [4] The second defendant was at all material time the first defendant’s director and guarantor.

[5] *Vide* letter dated 16 June 2001, the first defendant admitted default in the repayment of the facilities to the plaintiff.

C [6] The plaintiff had demanded repayment of the facilities *vide* notices dated 6 September 2002 to both the defendants but the notices of demand were not complied with.

D [7] As at 31 July 2002 and 31 October 2002, both the first and the second defendants’ debts due and owing to the plaintiff were RM9,815,530.75 and RM10,044,801.93 respectively.

[8] On 15 November 2002, the plaintiff commenced writ of summons against both the defendants.

E [9] Judgment in default of appearance was obtained against the first defendant on 11 April 2003, and against the second defendant on 17 February 2003.

F [10] Only the second defendant filed the summons in chambers to set aside the default judgment obtained against her (“the default judgment”).

#### **Delay**

G [11] It was argued by learned counsel Mr. Mark Taye for the plaintiff that the second defendant’s application in encl. (27) had pursuant to O. 42 r. 13 occasioned a delay of 20 months after service of the judgment on her.

H [12] The second defendant’s learned counsel Mr. AB Ng contended *inter alia* that the delay, if any, is merely technical, citing O. 2 r. 1(1) and O. 1A, *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 FC; and *Malayan United Bank Bhd v. Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762.

I [13] I shall first proceed to analyse O. 42 r. 13 which was relevant reads as follows:

**13. Setting aside ... judgments and orders (O. 42 r. 13)**

Where in these Rules provisions are made for the setting aside ... any ... judgment, a party intending to set aside ... such ... judgment must make his application to the Court and serve it on the party who has obtained the ... judgment within thirty days after the receipt of the ... judgment by him.

[14] In my view, the delay of 20 months occasioned by the second defendant cannot be said to be a mere technicality.

[15] The time frame set out in O. 42 r. 13 came into force on 1 August 1993. The second defendant making the application to set aside the default judgment must do so within this time frame of 30 days stated therein. As an example, a defendant who made his application eight years after judgment was granted was disentitled to have the judgment set aside: *Lee Tain Tshung @ Lee Thien Chiung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15 per NH Chan JCA (as he then was).

[16] In *Tuan Haji Ahmed Abdul Rahman, supra*, relied on by the second defendant, the Federal Court speaking through Edgar Joseph Jr FCJ made it clear that the judgment there had been irregularly obtained as it had been riddled with uncertainty and so it is readily distinguishable from the regular judgment in the instant case, as will be seen later in this judgment.

[17] The issue of delay in making an application to set aside a judgment in default of defence was not raised by the plaintiff in *Mohamed Taib Haji Ibrahim & Anor v. Perwira Habib Bank Malaysia Bhd* [1987] 2 MLJ 123 SC and so the judgment of the then Supreme Court is of no assistance to the second defendant herein.

[18] Reverting to the factual background before me, it is to be noted that the second defendant has neither made an application for extension of time nor proffered any explanation for the 20-month delay, although it is incumbent on her to do so. Such omission or failure militates against the defendant's case: *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 CA per Gopal Sri Ram JCA; *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533, 536 CA per Nik Hashim JCA (now FCJ); *Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors* [1999] 2 CLJ 51, 58 per Richard Malanjum J (now CJ Sabah & Sarawak)); and *Tan Ewe Chong & Ors v. Pribudi Sdn Bhd & Ors* [1997] 3 CLJ Supp 372 per Jeffrey Tan J.

**A Forum**

**[19]** The second defendant relied on s. 23(1) of the Courts of Judicature Act 1964 (“s. 23(1)”) to support the contention that the Melaka High Court is not the proper forum to hear this matter as she has a business address in Muar and the land charged to the plaintiff is also situated in Muar, in which case the Muar High Court is the proper forum.

**[20]** It was argued for the plaintiff that the Melaka High Court has jurisdiction over this matter as the cause of action arose in Melaka.

**[21]** In order to comprehend the second defendant’s submission, it is necessary for me to refer to the governing provisions contained in s. 23(1) as follows:

**D 23 Civil jurisdiction – general**

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:

- (a) the cause of action arose;
- (b) the defendant or one of several defendants resides or has his place of business;
- (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
- (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the court ...

As a starting point, art. 121(1) of the Federal Constitution provides for two High Courts in our country *viz* the High Court in Malaya and the High Court in Sabah and Sarawak. These two High Courts have jurisdiction to hear cases within their respective “local jurisdiction” which, in relation to High Court in Malaya, is defined in s. 3 of the Courts of Judicature Act 1964 as the States of Malaya, which include Melaka and Muar as branches having concurrent jurisdiction: *Sova Sdn. Bhd. v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55 per Lim Beng Choon J (as he then was).

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[22] It is to be noted that the second defendant as the first defendant's director and guarantor has applied for and obtained the facilities from the plaintiff in *Melaka* and the first defendant's registered address is also in *Melaka*. The question of jurisdiction is indeed a non-issue. It is clear that *Melaka* is the place where:

- (1) the cause of action arose under s. 23(1)(a); or
- (2) the facts on which the proceedings are based existed or are alleged to have occurred under s. 23(1)(c).

[23] The fact that the second defendant is in Muar does not mean that the Melaka High Court has no jurisdiction over her, as the Melaka High Court is a branch and so part and parcel of the High Court in Malaya.

[24] As the second defendant has executed the documents for the facilities in *Melaka*, I am unable to see how she could contend that the Melaka High Court is not the proper *forum conveniens*.

#### Service Of Writ

[25] It was canvassed for the second defendant that the default judgment has been irregularly obtained as the writ and statement of claim ("the writ") had been served on the second defendant at the wrong address, as her correct address is at Hostel Syarikat Lot 96 and 97, Batu 19, Jalan Segamat 84900 Tangkak, Johor ("the Tangkak address").

[26] The plaintiff retorted that the writ had been served on the second defendant by AR registered post, addressed to her at her last known address at No. 254 Jalan Dato, 84200 Muar Johor ("the Muar address").

[27] In my view, this issue may be resolved by reference to O. 10 r. 1(1) which provides for the service of a writ in the following words:

10.1(1) Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant or by **sending it by prepaid AR registered post addressed to his last known address** ... (emphasis added)

[28] From the affidavit of service in encl. (33), there can be no doubt that the writ had been served on the second defendant at her last known address ie, the Muar address, which appears in:

- A (1) her letter of guarantee executed in favour of the plaintiff;  
(2) the company documents of two companies *viz* the first defendant, and Linafil Spinning (M) Sdn Bhd, in both of which the second defendant was at all material time a director;
- B (3) her own statutory declarations sworn on 3 June 1999 and 15 March 2000; and  
(4) her National Registration Identity Card.
- C [29] Section 12 of the Interpretation Acts 1948 and 1967 contains a deeming provision in relation to service by post, in the following words:

**12. Service by post**

- D Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service:
- (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
- E (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.
- F (See *Pengkalan Concrete Sdn Bhd v. Chow Mooi & Anor* [2003] 6 CLJ 326 per Suriyadi Halim Omar J (now JCA); *MBF Finance Bhd v. Tiong Kieng Seng* [2001] 4 CLJ 38 per Clement Skinner J; *Bank Utama (Malaysia) Bhd v. The owner of & other persons interested in the Vessel 'Pintas Samutra 1' & Ors* [2003] 8 CLJ 110 per Clement Skinner J, and *MBF Finance Bhd v. Chew Liong Gak* [1993] 1 LNS 307 per Abdul Malek Ahmad J (now PCA)).
- G [30] Further, Pos Malaysia Bhd, in response to the inquiries by the plaintiff's solicitors, confirmed that the service had been effected on the second defendant on 10 December 2002.
- H [31] Although the second defendant had given the Tangkak address as her address, the photographs in exhs. OBY3 and 25 annexed to encl. (33) reveal that no building was to be found at the Tangkak address, as it is now a vacant piece of land. Hence,
- I the second defendant's denial of being served with a copy of the writ cannot be sustained.

[32] I therefore hold that the default judgment has been regularly obtained by the plaintiff. A

### ***Ultra Vires* Transaction**

[33] It was pointed out for the second defendant that the facilities granted to the first defendant were *ultra vires* the first defendant's memorandum of association, as a result of which the second defendant could not be liable. B

[34] The plaintiff submitted to the contrary. C

[35] It suffices for me to observe that the first defendant's failure to mount a challenge on the default judgment means that the first defendant has accepted its liability based on the facilities, thereby putting a halt to any dispute by the first defendant in relation to the facilities. The liability of the second defendant on the other hand is founded on the guarantee executed by the second defendant in favour of the plaintiff. The guarantee provides *inter alia* that the second defendant as a principal debtor shall guarantee and indemnify the plaintiff on all the debts due and owing by the first defendant to the plaintiff from time to time under the facilities. D E

[36] In the circumstances, I am unable to sustain the second defendant's above contention.

### **Excessive Interest**

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[37] The second defendant complained that the rate of interest exceeding 8% p.a. awarded to the plaintiff in the default judgment is excessive as O. 42 r. 12 provides for the rate of 8% per annum only. G

[38] The plaintiff asserted that the parties herein have agreed to the rate of interest.

[39] In my opinion, the answer is to be found in the documents executed by the parties, *viz* the facilities agreement, debentures, legal charges and letter of guarantee, pursuant to which the second defendant has agreed to the rate of interest imposed by the plaintiff and the plaintiff has the right to vary the rate thereof. (See facilities agreement dated 11 March 2000 section 7.01 "Payment of Interest/Commission"; and section 7.03 "Variation of Interest Rate" and guarantee cl. 1(1)). H I

A [40] The rate of interest exceeding 8% p.a. imposed on the default judgment is permitted under O. 42 r. 12, as amended, in the following words:

**12 Interest on judgment debts (O. 42 r. 12)**

B Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (**unless the rate has been otherwise agreed upon between the parties**), such interest to be calculated from the date of judgment until the judgment is satisfied. (emphasis added)

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[41] Under the amended O. 42 r. 12, generally every judgment debt shall carry interest at the maximum rate of 8% p.a., but an exception arises where the parties have agreed to another rate of interest. In view of the fact that the defendants have agreed to a rate other than the rate of 8% p.a., the amendment to O. 42 r. 12 which came into force on 11 December 1986 ie, some 21 years ago, it is permissible for the plaintiff to include in the judgment debt either a rate of interest not exceeding 8% (“the statutory rate”) or the rate which has been otherwise agreed between the parties (“the contractual rate”): see *Lee Tain Tshung, supra*, per Ahmad Fairuz JCA (now CJ Malaysia).

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[42] As the rate of interest on the judgment debt is based on the contractual rate which is allowed under O. 42 r. 12, the second defendant’s contention is without substance.

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**Penalty Interest**

[43] It was stressed for the second defendant that the plaintiff has imposed penalty and compound interest contrary to the law. Reference was made to *Malayan Banking Bhd v. Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 CLJ 263 HC and *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374 FC.

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[44] The plaintiff disagreed.

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[45] In considering *Malayan Banking Bhd, supra*, I notice that one of the terms of the loan was the charging of a penalty interest of 1%. The issue before Abdul Wahab J was whether penalty interest was contrary to s. 75 of the Contracts Act 1950 (s. 75”) thereby creating a triable issue to bar the signing of a summary judgment under O. 14. The learned judge held *inter alia* that the 1% penalty

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interest operates as the upper limit that may be claimed as damages. His Lordship's decision was not to the effect that the penalty interest was contrary to law.

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[46] In *Selva Kumar, supra*, the Federal Court in a judgment delivered by Peh Swee Chin FCJ (as he then was) held *inter alia* that in Malaysia, there is no distinction between liquidated damages and penalties as understood under English law and that in view of s. 75 the court must determine what is reasonable compensation.

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[47] In my view, the above two authorities do not support the second defendant's contention that a penalty interest is contrary to law. In fact, they militate against the second defendant's contention.

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[48] In *Realvest Properties Sdn Bhd v. The Co-operative Central Bank Ltd (Under Receivership)* [1996] 3 CLJ 823 FC, cl. 3.1 of the charge instrument prescribed the interest rate of 14.5% p.a. on monthly rests ("the prescribed interest") while cl. 3.2 provided for an additional interest in the event of default by the borrower. One of the contentions presented for the borrower was that the additional interest amounted to a penalty which was irrecoverable under s. 75. The Federal Court through the judgment of Peh Swee Chin FCJ (as he then was) at p 469F held *inter alia* that s. 75 allows the penalty stipulated for. (See also *Malaysia Building Society Bhd v. Univein Sdn Bhd* [2002] 2 CLJ 81, 106h to 107a and 107h HC; and *Pusat Bandar Damansara Sdn Bhd & Anor v. Yap Han Soo & Sons Sdn Bhd* [2000] 1 CLJ 346).

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[49] In the circumstances, the second defendant's contention is untenable.

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### Consideration For Guarantee

[50] The second defendant challenged the validity of the guarantee on the ground that it was not supported by consideration. *Chew Soon Tat v. Malaysia National Insurance Sdn Bhd* [1977] 1 LNS 15 FC; and *Mohamed Taib Haji Ibrahim & Anor., supra*, were cited in support.

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[51] It was argued for the plaintiff that consideration for the guarantee was stated in the preamble thereto and cls. 1(i) and 5.

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A [52] In my judgment, the existence of consideration for the guarantee is contained in preamble and cls. 1(i) and 5 of the guarantee. The preamble recites as follows:

B In consideration of your opening or continuing an account with and making or continuing to make advances loans or ... giving credit ... to Mesra Venture Sdn Bhd ... at my ... request ... I ... hereby ... agree with and guarantee you as follows ...

[53] The guarantee is expressed as a continuing guarantee, in cls. 1(i) and 5 in the following words:

C 1. I ... will pay you on demand:

D (i) **all moneys which now are or may during the operation of this Guarantee** be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you anywhere and on any account whatsoever ... **including interest** ...

E 5. This Guarantee shall be a **continuing guarantee** to you to the extent of **Ringgit Malaysia Nine Million and Four Hundred Thousand** with interest ... on the sum claimable at the rate which is levied on the customer from time to time.

F [54] In *Chew Soon Tat, supra*, the guarantee was signed by the guarantor on 3 April 1972 undertaking to stand guarantee to the extent of RM100,000. The Federal Court speaking through Ali Ag LP (as he then was) held *inter alia* that the guarantee could not be impugned on grounds of absence or want of consideration, but that the guarantor would only be liable for debts incurred after the date of the guarantee. It is significant for me to note that the guarantee there did not allude to the existence of a continuing guarantee as expressly stated in cls. 1(i) and 5 in the instant case and so the facts are readily distinguishable.

H [55] The facts in *Chew Soon Tat, supra*, were indeed distinguished by Siti Norma Yaakob J (later CJ (M)) in *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn Bhd & Ors* [1988] 1 LNS 82 wherein the guarantee was a continuing guarantee which guaranteed not only the facilities existing at the time of execution of the guarantee but also facilities to be made in the future; and that a continuing guarantee is quite unlike the guarantee that was decided in *Chew Soon Tat, supra*. (See also *Carlsberg Brewery Malaysia Bhd v. Soon Heng Aw & Sons Sdn Bhd & Ors* [1988] 2 CLJ 754; [1988] 1 CLJ (Rep) 420 per Idris J (as he then was).

[56] In *Mohamed Taib, supra*, the appellant had succeeded in raising serious questions of law relating to the absence of consideration and past consideration. However, in the case before me, these questions were answered by the preamble to and cls. 1(i) and 5 of the guarantee ie, existing and future facilities are expressly included herein (see *Heng Cheng Swee v. Bangkok Bank Ltd* [1978] 1 LNS 61 FC per Suffian LP (as he then was) and Lee Hun Hoe (CJ (Borneo) (as he then was)), followed by Lamin J (later PCA) in *Development & Commercial Bank Bhd v. Syarikat Farmco Sdn Bhd & Ors* [1988] 1 LNS 83.

[57] I therefore hold that the second defendant's contention herein is without any merits.

#### **Nominee Director**

[58] The second defendant claimed that she was merely acting as a nominee director for the first defendant and so could not be liable for the debt of the first defendant.

[59] It was submitted for the plaintiff that the second defendant's liability was founded on the guarantee.

[60] In my view, the second defendant's liability is expressly contained in the guarantee and the fact that she is perceived as a nominee director does not detract from her liability as a guarantor. I am therefore unable to accept the contention raised for the second defendant.

#### **Other Issues Raised**

[61] It needs to be observed that the second defendant's learned counsel has also raised the issue of the restructuring exercise of another company, the position of the land charged to the plaintiff by way of security for the facilities, and the relationship between the plaintiff and Affin Bank Bhd. Having carefully considered all these issues, I am of the view that they do not show any substance at all and are hereby rejected.

#### **Conclusion**

[62] On the foregoing grounds, I dismiss this appeal with costs. The decision of the learned registrar is hereby affirmed.